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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

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9 WAYLAND DEE KIRKLAND, No. CIV S-02-1266-RRB-CMK-P

10 Petitioner,

11 vs.

ORDER AFTER REMAND

12 D.K. BUTLER, et al.,

13 Respondents.

14 _____ /
15 Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of
16 habeas corpus pursuant to 28 U.S.C. § 2254. This case is now before this court on remand from
17 the Ninth Circuit Court of Appeals.

18 This case was dismissed on September 26, 2005, for petitioner's failure to exhaust
19 his state remedies. Petitioner's amended habeas petition raised two claims: a due process
20 violation for the prosecutor's refusal to disclose a video showing El Dorado County Jail Guards
21 beating petitioner on May 5, 2000 and ineffective assistance of counsel for failing to obtain the
22 this video. On January 5, 2006, this court ordered both parties to produce any video or portions
23 of videos from the El Dorado County Jail on May 5, 2000, which showed petitioner. These
24 videos were lodged by both parties on January 18, 2005. As a result, this court found these
25 videos constituted new evidence because the videos were thought not to exist when petitioner
26 filed his state habeas petitions. Therefore, this court dismissed petitioner's federal habeas for

1 failure to exhaust his state remedies.

2 Petitioner appealed this decision to the Ninth Circuit Court of Appeals. With a
3 citation to James v. Pliler, 269 F.3d 1124 (9th Cir. 2001), the Ninth Circuit vacated this court's
4 judgment and remanded the case to this court with the direction that this court reinstate the
5 petitioner's habeas corpus petition and stay the proceedings while petitioner returns to state court
6 to exhaust his claims.

7 In James v. Pliler, the Ninth Circuit held that "district courts must advise pro se
8 habeas petitioners of their right to strike unexhausted claims." Id. at 1126 (citing Tillema v.
9 Long, 253 F.3d 494 (9th Cir. 2001)); but see Pliler v. Ford, 542 U.S. 225. The Ninth Circuit
10 directed this court to stay proceedings pending exhaustion of claims in state court. These
11 proceedings are, therefore, hereby stayed.

12 Accordingly, IT IS HEREBY ORDERED that:

13 1. Pursuant to the Ninth Circuit's judgment vacating and remanding, these
14 proceedings are stayed pending exhaustion in state court;

15 2. Petitioner shall file a motion to lift the stay within 30 days of the
16 conclusion of state court proceedings;

17 3. The Clerk of the Court is directed to update the docket to reflect that the
18 Ninth Circuit vacated the September 26, 2005, judgment (Doc. 90); and

19 4. The Clerk of the Court is directed to update the docket to reflect that this
20 matter is reopened but is hereby stayed.

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22 DATED: January 24, 2008

23 
24 CRAIG M. KELLISON
25 UNITED STATES MAGISTRATE JUDGE
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